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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

73-1099

NO. A-533

CHESTER BASS, *Petitioner*

Against

THE STATE OF TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
To The Court Of Criminal Appeals
Of The State Of Texas

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The Petitioner, Chester Bass, prays that a writ of certiorari be issued to review the judgment of the Court of Criminal Appeals of the State of Texas of November 21, 1973.

OPINION BELOW

The opinion delivered by the Court of Criminal Appeals of the State of Texas in this cause is reported at —S.W.2d—and is appended to this petition as Appendix "A". This Petition for Writ of Certiorari is from the affirmance by the Court of Criminal Appeals of Texas of an Order revoking probation. Petitioner was indicted, tried and convicted on a plea of not guilty for the felony criminal offense of theft of filed papers, see Article 1427,

V.A.T.P.C., and Appendix "B", on October 27, 1966, and his punishment was assessed by a jury at seven (7) years confinement in the Texas Department of Corrections, with the jury recommending, see Article 42.12, Section 3a, V.A.T.C.C.P., probation. See Appendix "C". Petitioner appealed his conviction but same was affirmed by the Court of Criminal Appeals of Texas, see 427 S.W.2d 624, and Appendix "D", and the probation was placed into effect on June 24, 1968.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3) and Rule 19(1), Revised Rules of the Supreme Court of the United States of America.

QUESTIONS PRESENTED

Whether Petitioner was deprived of due process of law by failure of the State of Texas to give him sufficient notice that he violated his condition of probation that he not commit any criminal offense against the laws of Texas or of any other State or of the United States, where the State merely alleged that: "Said defendant committed the offense of misdemeanor embezzlement on or about August 31, 1968, in Harris County, Texas?"

Whether Petitioner was deprived of due process of law by failure of the State of Texas to afford Petitioner a preliminary hearing before an independent decision maker as to whether reasonable cause existed to believe that Petitioner had violated the condition of his probation that he not violate the law of the State of Texas or of any other State or of the United States?

Whether Petitioner was deprived of due process of law under the Constitution of the United States of America by the Texas procedure of conducting and

holding only one hearing on the State's Motion to Revoke Probation and whether said procedure was in violation of Morrissey and Booher v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593?

Whether Petitioner was deprived of due process of law under the Constitution of the United States of America by the Texas procedure of permitting a trial court to hold and conduct a hearing on the State's Motion to Revoke a Probationer's Probation, when, as the conclusion of which, such motion was denied, and then, at a later date, using the same evidence, hold and conduct another hearing on an "Amended" Motion to Revoke Probation, at the conclusion of which the State's Motion was granted and the probation was revoked?

Whether, under the Doctrine of Collateral Estoppel, as announced in Ashe v. Swenson, 397 U.S. 436, the State of Texas deprived Petitioner of due process of law by the trial court conducting a hearing on a State's Motion to Revoke Probation, denying same, and then, at a later date, on the same evidence adduced at the prior hearing, revoking petitioner's probation?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions and statutes involved are set out below. (Appendices "B", "C", "L", "M", and "N", pp. 25, 26, 63, 64, 65)

STATEMENT OF FACTS

This is an appeal from an order of a trial court revoking Petitioner's probation; the Petitioner thereafter being sentenced to serve not less than three (3) years nor more than seven (7) years confinement in the Texas Department of Corrections.

To appreciate Petitioner's petition, the cause is presented in chronological fashion.

After Petitioner's original conviction was appealed and affirmed, see 427 S.W.2d 624, and Appendix "D", he then reappeared before the trial court on June 14, 1968, where his probation was then made effective. See *Smith v. State*, 478 S.W.2d 518.

Thereafter, the State of Texas, on December 16, 1968, through her Assistant District Attorney, filed "State's Motion to Revoke Probation." See Appendix "E". Apparently, by the Record on Appeal, nothing occurred except the arrest of Petitioner and the posting of bail. See Appendix "F". As reflected by Appendix "F", the parties appeared on March 20, 1969, and the matter was reset to May 29, 1969; then reset to August 21, 1969, then reset to November 7, 1969; then reset to December 5, 1969; and then reset to February 9, 1970. During the last interval, the State then filed, on January 29, 1970, "The State's First Amended Motion to Revoke Probation." See Appendix "G", and Appendix "F".

On February 9, 1970, a hearing to revoke petitioner's probation was held, at the conclusion of which, on February 10, 1970, the trial court overruled the State's First Amended Motion to Revoke Probation and Petitioner was permitted to remain on probation. See Appendix "F".

Thereafter, on October 7, 1971, the State filed an "Amended Motion to Revoke Probation," see Appendices "C" and "H". Apparently, see Appendix "F", the matter was set for hearing on January 6, 1972, but was reset, on motion for continuance by the State, for hearing on January 28, 1972, at which time it was reset to February 11, 1972; and then reset to February 18, 1972.

On February 18, 1972, the State filed her "Amended Motion to Revoke Probation," see Exhibit "I",[1] on which the hearing was held, at the conclusion of which, also on February 18, 1972, the trial court revoked Petitioner's probation, from which this appeal is prosecuted.

At this hearing, on February 18, 1972, Petitioner first objected to proceeding on the State's "Amended Motion to Revoke Probation," contending the Motion was insufficient to properly inform Petitioner of what he was accused. See Appendix "J".

After this was overruled by the trial court, the Petitioner then plead double jeopardy and res adjudicata, which pleas were also overruled. See Exhibit "J".

At the February 18, 1972, hearing, the State of Texas, to prove its case against Petitioner, then introduced the transcript of the hearing held on February 9 and 10, 1970, when the State's Motion to Revoke had been overruled and denied. The only additional evidence adduced by the State at the hearing was from a witness who testified only as to the date made the basis of the Motion to Revoke. The Petitioner also testified and continued to maintain his innocence to the accusation made against him. His probation officer also testified that he had been Petitioner's Probation officer since May of 1971; that he did not "suggest the filing of this [Motion to Revoke] or instigate the filing of it," nor did anyone under his supervision in the Adult Probation Department suggest the filing of the Motion to Revoke Probation, and he would

1. The State did allege other violations of the conditions of probation; however, these allegations were not pursued and the State's Motion to Revoke should be read as though these other allegations did not exist or were not set forth in the Motion.

not have any objection to Petitioner remaining on probation. See Exhibit "K".

The trial Court revoked Petitioner's probation and he then appealed to the Court of Criminal Appeals of Texas.

The Court of Criminal Appeals, see __S.W.__, on appeal, see Appendix "A", affirmed on October 31, 1973; and on November 21, 1973, denied Petitioner permission to file his Motion for Rehearing. Thus, Petitioner has exhausted all known State remedies available to him on direct appeal. See Appendix "A".

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Article 42.12, Section 8, V.A.T.C.C.P., see Appendix "C", provides in part;

> At any time during the period of probation the court may issue a warrant of violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. Thereupon, the court shall cause the defendant to be brought before it and after a hearing without a jury, may either continue or revoke the probation and, if probation is revoked, shall proceed to dispose of the case as if there had been no probation.

The statute does not require a written application or written motion to revoke a defendant's probation. See *Johnson v. State,* 410 S.W.2d 785.

Thus, in the State of Texas, as to written pleadings, on the part of the State, no written pleadings of any kind are required by statute. The only requirement is that an arrest warrant issue for the arrest of a probationer; and, upon arrest, the probationer be brought before the trial court, whereupon a hearing shall be held to determine whether the probation should be revoked or the probationer continued on probation.

By case law, a probationer is, in Texas, accorded certain fundamental rights by the Court of Criminal Appeals. He has the right to bail, if his probation is predicated upon a misdemeanor criminal conviction, see *Smith v. State,* 493 S.W.2d 958, but if predicated upon a felony criminal conviction, see *Hilbish v. State,* 485 S.W.2d 554, he is not entitled to bail. He is afforded the right to counsel, be it court appointed or retained. See *Ex parte McCarver,* 415 S.W.2d 409; and, compare, *Ex parte Marshall,* 479 S.W.2d 921. He is entitled to a speedy hearing, see *Farris v. Tipps,* 463 S.W.2d 176, if he moves for one, see *McClure v. State,* 496 S.W.2d 588, but his counsel is not given any specific time in which to prepare for a hearing. See *Kunestler v. State,* 486 S.W.2d 367, and *Gist v. State,* 267 S.W.2d 835. Though there is no provision in the statute for a written application to revoke probation or a written motion to revoke probation, nevertheless, if the State elects to file such instrument, the Court of Criminal Appeals has held such application or motion must be sufficient to give a probationer fair notice of what condition is charged with violating. See *Jansson v. State,* 473 S.W.2d 40. The hearing before the court is administrative in nature, see *Hill v. State,* 480 S.W.2d 200, and the only question on appeal is whether the trial court abused its discretion in revoking the probation. See *Arm-*

strong v. State, 472 S.W.2d 150, and *Briones v. State,* 473 S.W.2d 39. Surprisingly, a probationer is entitled to invoke the applicability of the Fourth Amendment to the Constitution of the United States of America. See *Thomas v. State,* 493 S.W.2d 957, and *Rushing v. State,* 500 S.W. 2d 667. But, he is not entitled to invoke the applicability of the Fifth Amendment to the Constitution of the United States of America. See *Bustamente v. State,* 493 S.W.2d 921. The hearsay rule, however, is still applicable. See *Gormany v. State,* 486 S.W.2d 324.

The first issue presented to this Honorable Court, whether Petitioner was given sufficient notice of the alleged violation of his condition of probation, was not initially presented to the Court of Criminal Appeals in the original appeal of this cause. However, the issue presented here was presented in Petitioner's Motion for Rehearing. As there is no longer a statutory right to file a Motion for Rehearing, but simply a right to present a Motion for Leave to File a Motion for Rehearing, Petitioner submits he adequately presented the matter to the Court of Criminal Appeals of Texas, but that Court, for unknown reasons, denied Petitioner leave to file his Motion for Rehearing.

This Honorable Court, in several recent decisions, has discussed the due process rights of a probationer or parolee.

In *Mempa v. Rhay* and *Walking v. Washington State Board of Prison Terms and Paroles,* 389 U.S. 128, 19 L.Ed.2d 336, 88 S.Ct. 254, (1967), this Court held, in a unanimous opinion by Mr. Justice Marshall, as a matter of Federal constitutional law, that an attorney must be afforded to a probationer or parolee at the proceeding described in that case. *McConnell v. Rhay,* 393 U.S. 2,

21 L.Ed.2d 2, 89 S.Ct. 2 (1968), held *Mempa v. Rhay*, supra, was to be applied retroactively.

This Court, in *Morrissey and Booher v. Brewer*, 498 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593, (1972), next considered the question of whether the Due Process Clause of the Fourteenth Amendment required at State to afford an individual some opportunity to be heard prior to revoking his parole. This Court, the majority speaking through the Chief Justice, first answered that the termination of a parole called for some orderly process, however informal, under the Fourteenth Amendment, whether one considered a parole a "right" or a "privilege." (495) The majority then answered the question of what process was due in that cause. After discussing the various interests of the State versus the individual parolee, the majority held: "Yet, the State has no interest in revoking parole without some informal procedural guarantees." (495). The majority then concluded: "In our view, due process requires that after the arrest, the determination that reasonable ground exists for revocation of parole should be made by someone not directly involved in the case." Thus, a preliminary hearing conducted by one uninvolved was mandated. (497). As to the notice to be given to the parolee at the preliminary hearing, the majority said:

> "The notice should state what parole violations have been alleged." (497).

The preliminary hearing, it is submitted, is to be a "probable cause" type hearing as to whether the parole should be further held or released at that time. "There must also be an opportunity for a hearing, if it is desired by the parolee, prior to the final decision on revocation by the parole authority."

Setting out the minimum requirements of due process, the Chief Justice held these included:

(a) written notice of the claimed violations of parole;

(b) disclosure to the parolee of evidence against him;

(c) opportunity to be heard in person and to present witnesses and documentary evidence;

(d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);

(e) A "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and

(f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

The cause was then remanded back to the Court of Appeals for its return to the District Court. (499).

Mr. Justice Douglas, dissenting, as to the contention made by this Petitioner, probably came closer to this issue, when he said:

> It is only procedural due process, required by the Fourteenth Amendment, that concerns us in the present cases. Procedural due process requires the following.
>
> If a violation of a condition of parole is involved, rather than the commission of a new offense, there should not be an arrest of the parolee and his return to the prison or to a local jail. Rather, notice of the alleged violation should be given to the parolee and a time set for a hearing. The [408 U.S. 498] hearing should not be before the parole officer, as he is the one who is making the charge and "there is inherent danger in combining the functions of judge and advocate." Jones v. Rivers, 338 F.2d 862, 877

(CA 4 1964) (Sobeloff, J., concurring). Moreover, the parolee should be entitled to counsel. See Hewett v. North Carolina, 415 F.2d 1316, 1322-1325 (CA 4 1969); People ex rel, Combs v. LaVallee, 29 App Div. 2d 128, 286 NYS2d 600 (1968); Perry v. Williard, 247 Ore 145, 427 P2d 1020 (1967). As the Supreme Court of Oregon said in Perry v. Williard, "A hearing in which counsel is absent or is present only on behalf of one side is inherently unsatisfactory if not unfair. Counsel can see that relevant facts are brought out, vague and insubstantial allegations discounted, and irrelevancies eliminated." Id., at 148, 427 P.2d, at 1022. Cf. Mempa v. Rhay, 389 U.S. 128, 135, 19 L.Ed.2d 336, 340, 88 S.Ct. 254.

The hearing required is not a grant of the full panoply of rights applicable to a criminal trial. But confrontation with the informer may, as Roviaro v. United States, 353 U.S. 53, 1 L.Ed.2d 639, 77 S.Ct. 623, illustrates, be necessary for a fair hearing and the ascertainment of the truth. The hearing is to determine the fact of parole violation. The results of the hearing would go to the parole board—or other authorized state agency—for final action, as would cases which involved voluntary admission of violations.

The rule of law is important in the stability of society. Arbitrary actions in the revocation of paroles can only impede and impair the rehabilitative aspects of modern penology. "Notice and opportunity for hearing appropriate to the nature of the case," Boddie v. Connecticut, 401 US 371, 378, 28 L Ed 2d 113, 119, 91 S Ct 780, are the rudiments of due process which restore faith that our society is run for the many, not the few, and that fair dealing rather than caprice will govern the affairs of men.

I would not prescribe the precise formula for the management of the parole problems. We do not sit

> as an ombudsman, telling the States the precise procedures they must follow. I would hold that so far as the due process requirements of parole revocation are concerned:
>
> (1) the parole officer—whatever may be his duties under various state statutes—in Iowa appears to be an agent having some of the functions of a prosecutor and of the police;
> the parole officer is therefore not qualified as a hearing officer;
>
> (2) the parolee is entitled to a due process notice and a due process hearing of the alleged parole violations including, for example, the opportunity to be confronted by his accusers and to present evidence and argument on his behalf; and
>
> (3) the parolee is entitled to the freedom granted a parolee until the results of the hearing are known and the parole board—or other authorized state agency—acts.
>
> I would reverse the judgments and remand for further consideration in light of this opinion.

Of course, it should be understood that this Petitioner was not on parole, but was on probation. He had neither been finally convicted nor sentenced prior to his probation being revoked. Further, it should be understood by Petitioner he is not claiming he did not have counsel nor that he did not have a hearing. His claim is that he did not, pursuant to due process of law, receive adequate and sufficient notice to go forward at the hearing. Petitioner's contention is that it is not sufficient for the State to simply say: "You are charged with a certain criminal offense," without stating any specifics thereof. "Come and defend yourself." That is what, Petitioner submits, occurred in this cause. Notice should be more than: "You

all come." "During the hearing you will learn what we intend to prove against you."

After *Morrissey and Booher v. Brewer,* supra, this Honorable Court next considered *Gagnon v. Scarpelli,* —U.S. —, 36 L.Ed.2d 656, 93 S.Ct. 1756 (1973), and the questions whether a previously sentenced probationer was entitled to a hearing when his probation was revoked and, if so, whether he was entitled to be represented by appointed counsel at such hearing. Mr. Justice Powell delivered the majority opinion for the Court and first discussed the earlier decisions of *Mempa v. Rhay,* supra, and *Morrissey v. Brewer,* supra. The Court first agreed with the Petitioner in that cause there was no relevant difference to the guarantee of due process between a revocation of parole hearing and a revocation of probationing hearing. Though agreeing with this general statement, this Petitioner would show that great distinctions do lie between the two in Texas. This Court, nevertheless, in *Gagnon v. Scarpelli,* supra, upheld the right that a probationer, like a parolee, was entitled to a preliminary and a final hearing. In Texas, however, there is only a final hearing without a preliminary hearing where the individual is on probation. In Texas, a probationer is subjected to one hearing and that is the final hearing. See Appendix "C".

The Court held, however, in *Gagnon v. Scarpelli,* supra, that the State is not required to provide counsel for indigents in all probation or parole revocation cases; apparently weighing the costs of an adversarial proceeding with that of a non-adversarial system. Thus, each case will decide whether a probationer or parolee is entitled to counsel at the hearing. The Court, in conclusion, in *Gagnon v. Scarpelli,* supra, remanded the case back to

the District Court, pursuant to *Morrissey v. Brewer,* supra.

Mr. Justice Douglas, dissenting in part, held that due process required the appointment of counsel in that cause because of the claim that respondent's confession of the burglary was made under coercion. (667).

It should be understood, however, that in Texas, with the exception of a jury trial, a revocation of probation proceeding is a criminal trial; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised and it is truly an adversary proceeding with its own unique characteristics. In Texas, in a revocation or probation proceeding, the probation officer is nothing more than a witness for the prosecution or the defense; often being placed under the rule with the other witnesses unless this is waived. He is, of course, subject to the hearsay rule of evidence. Formal procedures and rules of evidence are employed and the trial judge is the only person who decides whether a person's probation is or is not revoked. In short, in Texas, a hearing on the State's Motion to Revoke Probation is a non-jury trial to the court in the usual sense.

Again, and hopefully, not to be repetitious, the first question presented to this Honorable Court at this time is whether the notice given to this Petitioner; i.e., "that said Defendant committed the offense of misdemeanor embezzlement on or about August 31, 1968, in Harris County, Texas" was sufficient to comport with due process of law. Cf. *Burns v. United States,* 287 U.S. 216, (1932).

If the preliminary hearing mentioned in the above cases had been held in this cause, it is very likely that Peti-

tioner could not make the claim he now makes.[2] However, in Texas, there is no preliminary hearing regarding the State's Motion to Revoke Probation. There is one hearing and it is the hearing at which, on one roll of the dice, the Petitioner stays or goes to the penitentiary; subject only to Appellate review whether the trial judge abused his discretion in revoking the probation in Texas. Of course, a probationer has the right to appeal his revocation and he is subject to the same procedural requirements of one who is first appealing a conviction.[3] However, unless he has "covered his tracks" at the trial level, he is relegated to the decision that "the trial judge did not abuse his discretion in revoking the probation." Thus, from a practical standpoint, if not legal standpoint, the stage is set from the commencement of the matter by the State's Motion to Revoke Probation. The Court of Criminal Appeals actually has held that if the pleadings of the State are deficient to give sufficient notice to the probationer of what he is charged, and the probationer objects to going forward, then, even though the evidence is overwhelming to support the trial court's order of revocation, the cause will, nevertheless, be reversed and remanded back to the trial court, see *Burgett and Rodgers v. State*, 485 S.W.2d 578, just as though it were a trial to the Court and the indictment or information were faulty. In the latter, if held to be void, the prosecution is ordered dismissed. See *Grays v. State*, 487 S.W.2d 348, for example. Petitioner submits he was not given the benefit of that ruling by the Court of Criminal Appeals.

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2. Under no stretch of the imagination could one claim that Petitioner had a preliminary hearing in this cause.

3. See *Jones v. State*, 478 S.W.2d 937; and *Stembridge v. State*, 477 S.W.2d 615.

In a Criminal proceeding in Texas, such as in this cause, where the whole proceeding is one ball of wax, what can be more important than adequately and fully informing a probationer of what he is accused? As Mr. Justice Black said in *Cole v. The State of Arkansas,* 68 S.Ct. 514, 333 U.S. 196, 92 L.Ed. 644 (1948):

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal . . . It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." (517)

Even in the State of Texas, if this had been an original Indictment rather than a Motion to Revoke Probation, it would have been held to be void. See *Ryan v. State,* 1915, 176 S.W. 49; and *King v. State,* 1961, 344 S.W.2d 693. Thus, should not the State, where the State alleges a violation of the law, to satisfy the rudiments of due process, at least inform the probationer of the basic elements of the criminal offense alleged against him? It is respectfully submitted this should occur and this Petition for Writ of Certiorari should be granted for the following reasons:

1. The failure of the State of Texas to properly, adequately, and sufficiently give Petitioner notice of the accusation made against him for violating his condition of probation;
2. The failure of the State of Texas to afford Petitioner a preliminary hearing before an independent decision maker as to whether reasonable cause ex-

isted to believe that Petitioner had violated his condition of probation;

3. Such failures on the part of the State of Texas, in this cause, are in violation of due process of law as provided by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States of America. See Appendices "L", "M", and "N".

The Petitioner, in the original appeal of this cause to the Court of Criminal Appeals, contended, see Appendix "A", that the State of Texas could not hold a second hearing, on the same basic allegations, using the same evidence, in a revocation of probation case. This contention was overruled by the Court of Criminal Appeals.

Petitioner's position herein is that the terms "double jeopardy" and "collateral estoppel" are to be used synonymously when an issue of ultimate fact once has been determined by a valid and final hearing. That issue cannot again be litigated between the same parties in any future lawsuit. By statute, see Art. 42.12, Section 3, see Appendix "C", no final judgment is entered after a hearing, but the trial court simply determines at the one and final hearing whether the probation shall be revoked or if the probationer shall be allowed to remain on probation. The hearing in Texas is, thus, not a final hearing in the usual sense in that, as in this cause, another hearing may be held using the same identical incriminating evidence which was used at the earlier hearing where the trial court overruled the State's Motion to Revoke Probation and permitted Petitioner to remain on probation.

As in *Ashe v. Swenson*, 397 U.S. 436, 25 L.E.2d 469, 90 S.Ct. 1189 (1970), the issue presented here is whether the State of Texas, after a trial court has, after a hearing, overruled the State's Motion to Revoke

Probation, may constitutionally hale the Petitioner back into Court to litigate the same identical issue which had already been previously litigated.

Petitioner should be understood that he is not asking this Court to hold that once a probationer defeated the State's allegation at one hearing he is free to do whatever he chooses during the remaining term of probation. He is simply contending that once the wrong, for which the probationer has been accused, has been litigated, that that specific matter is forever foreclosed from later being used against a probationer or a parolee.

The evil inherent and the opportunities for multiple prosecution for the type procedure used here are, indeed, frightening. For example, if a probationer is placed on probation for ten (10) years, and, one month thereafter, he receives a traffic citation for driving a motor vehicle without a valid driver's license and admits this violation by paying the usual $27.50 fine, he may then, on this and this alone, be brought before the trial court to determine whether the probation should or should not be revoked. Let us assume, further, however, after the hearing, the trial court overrules or denies the State's Motion to Revoke Probation, even though the probation could have been revoked, and the trial court could have sentenced the probationer to the penitentiary for ten (10) years for violating his probation by driving without a valid Texas driver's license. See *Gamble v. State,* 484 S.W.2d 713. "Under any circumstance, appellant's own admission that he was knowingly driving without a driver's license in violation of the law during the probationary period would be sufficient evidence, standing alone, to justify revocation." (715). Then, for whatever reason the State chose, it could, prior to the end of the ten (10)

years, haul the probationer back into Court, ask, via a Motion to Revoke Probation, not on new evidence or a new violation but on the evidence adduced at the hearing held almost nine (9) years previously, that the probation be revoked and, as the law now stands, the probationer would have no recourse but to go and do his ten (10) years in the cotton-fields at the Texas Department of Corrections if the trial judge, for whatever reason, revoked the probation.

Petitioner submits and contends that the procedure used here is, by the teachings found in *Ashe v. Swenson*, supra, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America, see Appendices "L" and "N", as made applicable to the States, see *Benton v. Maryland*, 395 U.S. 784, 87 S.Ct. 2056, 23 L.Ed.2d 707 (1969), and such procedure used herein denied this Petitioner due process of law. In short, under the Texas procedure as it now exists there is no "final" hearing on the State's Motion to revocation probation. It is "final" only if the prosecution says it is final.

As far as this Petitioner or his present counsel is aware, there is, in Texas, also no such limitation to the number of "hearings" a parolee may be subjected concerning a specific alleged violation of parole.

Petitioner, therefore, petitions this Honorable Court to grant this Application for Writ of Certiorari, and, after doing so, hold that the State or Government, once it has litigated a certain alleged violation of probation or parole and the trial court or the hearing body has overruled or denied the motion to revoke probation or parole and permitted the probationer or parolee to continue on probation or parole, then the State or Government is forever pre-

cluded from again using the same evidence at a later hearing to revoke the probationer or parolee's probation or parole.

CONCLUSION

For all the reasons stated herein, Certiorari should be granted in this Cause. The ruling and Judgment of the Court of Criminal Appeals of the State of Texas, made and entered on November 21, 1973, should be reversed and this Cause should be remanded to the said Court of Criminal Appeals of Texas to enter an Order reversing its former Judgment and remanding this Cause for new hearing to the 178th Judicial District Court of Harris County, Texas.

Respectfully submitted,

MARVIN O. TEAGUE
Attorney for Petitioner
999 State National Building
412 Main Street
Houston, Texas 77002
222-1728

CERTIFICATE OF PROOF OF SERVICE

I, Marvin O. Teague, Attorney for Petitioner, Chester Bass, hereby certify that a copy of the foregoing Petition for a Writ of Certiorari has been deposited in the United States Mail, postage prepaid, certified, and properly addressed to Respondent's Counsel, Honorable John L. Hill, Attorney General of the State of Texas, State Supreme Court Building, Austin, Texas, this the _____ day of January, A.D. 1974.

MARVIN O. TEAGUE

APPENDIX "A"

CHESTER BASS, Appellant

v.

THE STATE OF TEXAS, Appellee

NO. 46,934
Appeal from Harris County

OPINION

This is an appeal from an order revoking probation.

On October 27, 1966, appellant was convicted of theft of filed papers, Art. 1427, V.A.P.C., and punishment was assesed at seven years, probated. Probation was conditioned that appellant violate no law. On February 18, 1972, the trial court entered an order revoking probation, and finding that appellant had committed misdemeanor embezzlement.

Appellant's brief fails to comply with Art. 40.09, Sec. 9, V.A.C.C.P., in that it fails to set forth each ground of error separately. However, one ground of error will be considered in the interest of justice.

Appellant contends his constitutional right not to be placed twice in jeopardy for the same offense was violated when the court revoked his probation on the same evidence heard by the same court in denying a prior motion to revoke, and continuing appellant on probation[1] In denying the motion the court stated:

---

1. Art. 42.12, Sec. 8, V.A.C.C.P.

> "All right. On the record presented to this Court, the Court is restrained to revoke the probation. The probation remains in effect under the same terms and conditions."

It appears that in February of 1970 the court heard and denied the State's First Amended Motion to Revoke Probation. At the subsequent hearing on February 18, 1972, the testimony adduced at the prior hearing was admitted in full without objection. In addition, the information, judgment and sentence, and mandate of affirmance in appellant's conviction for misdemeanor embezzlement were admitted into evidence.[2]

In Settles v. State, 403 S.W.2d 417, appellant contended the unsuccessful use of a charge of assault to murder in revocation proceedings constituted former jeopardy when he was later convicted for aggravated assault arising out of the same transaction. In affirming we held:

> "The allegation in a motion to revoke probation that probationer has committed a particular offense when the motion is heard by the court does not constitute jeopardy and will not bar a subsequent prosecution for such offense. Especially is this true in the case at bar where the court declined to revoke probation."

In Barber v. State, 486 S.W.2d 352, where the State was allowed to amend its motion to revoke prior to the hearing, this Court stated:

---

2. Appellant's conviction for misdemeanor embezzlement was affirmed by this court on March 31, 1971, after the first revocation hearing. Bass v. State, 464 S.W.2d 668.

"A hearing upon a motion to revoke probation is addressed to the trial court's discretion in determining whether the probation shall be revoked or continued. The result of such a hearing is neither conviction nor acquittal. [Citations omitted] Thus appellant's contention of jeopardy is without merit."

Finding no abuse of discretion, the judgment is affirmed.

MORRISON, Judge

(Delivered October 31, 1973)

A True Copy
Attest:
Glenn Haynes, Clerk
Court of Criminal Appeals of Texas
By: Tommy Lowe, Deputy

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
OF TEXAS
AUSTIN, TEXAS

I, TOMMY LOWE, Chief Deputy Clerk of The Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 46,934, styled:

CHESTER BASS, Appellant

v.

The STATE OF TEXAS, Appellee

the judgment of the 178th Judicial District Court of Harris County, Texas, was affirmed on October 31, 1973 and on November 21, 1973, leave to file the appellant's motion for rehearing was denied.

THEREFORE, with the denying of the leave to file appellant's motion for rehearing, this cause was disposed of by this, The Court of Criminal Appeals, on November 21, 1973, and the appellant having exhausted all remedies in said Court the judgment has now become final on the docket of this Court.

WITNESS my hand and seal of said Court, at office, in Austin, Texas, this the 21st day of November, A.D. 1973.

TOMMY LOWE
Tommy Lowe, Chief Deputy Clerk
Court of Criminal Appeals of Texas

APPENDIX "B"

VERNON'S ANNOTATED TEXAS PENAL CODE

ARTICLE 1427. STEALING RECORD BOOKS OR FILED PAPERS

"Whoever shall take and carry away any record book or filed paper from any clerk's office, public office, or other place where the same may be lawfully deposited, or from the lawful possession of any person whatsoever, with intent to destroy, suppress, alter or conceal, or in any wise dispose of the same, so as to prevent the lawful use of such record book or filed paper, shall be confined in the penitentiary not less than three nor more than seven years. Acts 1859, p. 181."

APPENDIX "C"

VERNON'S ANNOTATED TEXAS CODE OF CRIMINAL PROCEDURE

ARTICLE 42.12. ADULT PROBATION AND PAROLE LAW.

SECTION 3a.

"Where there is a conviction in any court of this State and the punishment assessed by the jury shall not exceed ten years, the jury may recommend probation upon written sworn motion made therefor by the defendant, filed before the trial begins. When the trial is to a jury, and the defendant has no counsel, the court shall inform the defendant of his right to make such motion, and the court shall appoint counsel to prepare and present same, if desired by the defendant. In no case shall probation be recommended by the jury except when the sworn motion and proof shall show, and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this or any other State. This law is not to be construed as preventing the jury from passing on the guilt of the defendant, but he may enter a plea of not guilty. In all eligible cases, probation shall be granted by the court if the jury recommends it in their verdict."

"If probation is granted by the jury the court may impose only those conditions which are set forth in Section 6 hereof."

SECTION 3b.

"Where probation is recommended by the verdict of a jury as provided for in Sec. 3a above, a defendant's probation shall not be revoked during his good behavior, so long as he is within the jurisdiction of the court and his residence is known, except in accordance with the provisions of Sec. 8 of this Article. If such a defendant has no counsel, it shall be the duty of the court to inform him of his right to show cause why his probation should not be revoked; and if such a defendant requests such right, the court shall appoint counsel in accordance with Articles 26.04 and 26.05 of the Code to prepare and present the same; and in all other respects the procedure set fourth in said Sec. 8 of this Article shall be followed."

SECTION 8.

"At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power to arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. Thereupon, the court shall cause the defendant to be brought before it and after a hearing without a jury, may either continue or revoke the probation and, if probation is revoked,

shall proceed to dispose of the case as if there had been no probation."

"Any probationer who removes himself from the State of Texas without permission of the court having jurisdiction of the case, shall be deemed and considered a fugitive from justice and shall be subject to extradition as now provided by law. No part of the time that the defendant is on probation shall be considered as any part of the time that he shall be sentenced to serve. The right of the probationer to appeal to the Court of Criminal Appeals for a review of the trial and conviction, as provided by law, shall be accorded the probationer at the time he is placed on probation. When he is notified that his probation is revoked for violation of the conditions of probation and he is called on to serve a sentence in a jail or in an institution operated by the Department of Corrections, he may appeal the revocation.

APPENDIX "D"

MANDATE OF AFFIRMANCE FROM COURT OF CRIMINAL APPEALS AND ATTACHED THERETO OPINION, RECORDED: VOLUME 2, PAGE 612.
FILED: MAY 27, 1968

TRIAL COURT NO. 115811

THE STATE OF TEXAS,

TO THE 178TH. JUDICIAL DISTRICT COURT, HAS,
CRIMINAL DISTRICT COURT NO. 4 OF HARRIS COUNTY — GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 22ND. day of MAY A.D. 1968, the cause upon appeal to revise or reverse your Judgment between

CHESTER BASS, Appellant,

No. 41,055 vs.

The State of Texas, Appellee,

was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

APPELLANT'S MOTION FOR REHEARING OVERRULED.
APPELLANT'S SECOND MOTION FOR REHEARING OVERRULED WITHOUT WRITTEN OPINION:

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. K. K. WOODLEY, Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 24TH. day of MAY A.D. 1968

S* E* A* L

Clerk.

FILED
RAY HARDY
District Clerk
MAY 27 1968
Harris County, Texas

Deputy-Clerk

No. 41,055

MANDATE

FROM

COURT OF CRIMINAL APPEALS

Austin, Texas

CHESTER BASS
Appellant.

vs.

THE STATE OF TEXAS,
Appellee.

Issued MAY 24, 1948

[signature] Clerk.

Deputy Clerk.

RECORDED: VOLUME 2, PAGE 612, GENERAL MINUTES OF 178TH DISTRICT COURT OF HARRIS COUNTY, TEXAS.

CHESTER BASS, Appellant

v.

THE STATE OF TEXAS, Appellee

NO. 41,055

Appeal from Harris County

OPINION

Appellant was convicted under Art. 1427, P.C., of the offense of theft of filed papers and his punishment was assessed at confinement in the Texas Department of Corrections for a term of seven years.

Upon recommendation of the jury, imposition of sentence was suspended by the court and appellant was placed upon probation upon certain terms and conditions.

The indictment, omitting the formal parts, charged:

> ". . . that CHESTER BASS on or about the 16th day of December, A.D. 1964, in said County and State, and interior to the presentment of this indictment, in the County and State aforesaid, did fraudulently take and carry away from the office of W. B. Barfield, the Clerk of the Corporation Court of the City of Houston, of Harris County, Texas, certain filed papers, to-wit, four complaints numbered 642-60795, 64260796, 64260797, and 64260798, styled The State of Texas vs. James Vernon Hodges, which said papers were then and there lawfully deposited in said office, with the intent to destroy, suppress, alter, conceal, and dispose of the same, so as to prevent the lawful use of such filed papers."

We shall discuss the grounds of error urged by appellant in his brief filed with the clerk of the trial court.

It is insisted that the court erred in overruling appellant's motion to quash the indictment because it did not allege, in particular, what "lawful use" appellant sought to prevent in taking the complaints. It is also contended that error was committed by the court in overruling appellant's exception to the court's charge for failing to define the term "lawful use" and in refusing to grant his motion for an instructed verdict of not guilty because no evidence was presented with reference to the lawful use which appellant prevented.

It should first be noted that the indictment, as drawn, followed the language of the statute, Art. 1427, supra. This is ordinarily sufficient. 30 Tex. Jur. 2d 580, Sec. 27; Borski v. State, 225 S.W.2d 180; Campbell v. State, 297 S.W.2d 847. It also follows the form suggested in Willson's Criminal Forms, Seventh Edition, Sec. 1974, at page 451.

Under the provisions of Art. 45.01, C.C.P., the purpose of a complaint in corporation court is to commence the proceedings and thereby confer jurisdiction upon the court. This is the ordinary purpose and lawful use of a complaint. See: Bragg v. State, 6 S.W.2d 365, cited by appellant.

We do not agree that the indictment should have specifically alleged what "lawful use" appellant sought to prevent in taking the complaints.

Witte v. State, 17 S.W. 723, cited by appellant, is clearly distinguishable from the present case, because in that case the filed paper was a deed which the state contended had been forged by the accused and then destroyed to prevent its being used in a prosecution against him for forgery. In the present case there is no indication that the complaints filed in the corporation court against James

Vernon Hodges were for any use other than to lawfully commence prosecution against him. Proof that appellant took the complaints on file was sufficient to authorize the jury to find that he did so to prevent their lawful use.

While appellant's complaint to the court's charge for failing to define "lawful use" is not properly before us for review—no exception having been made to the charge, in writing, as required by Arts. 36.14 and 36.15, C.C.P.—we observe that, under the facts, no definition was required.

In his next ground of error, appellant insists that the court erred in failing to grant him a new trial because "the verdict of the jury is contrary to the Law and the evidence."

It is first insisted that the state's case fails because there was no evidence that the four commplaints were ever seen by W. B. Barfield, the corporation court clerk named in the indictment.

While the proof does not show that Barfield actually saw the original complaint, his testimony, together with that of his assistant, G. J. Sullivan, does show that the complaints were made and filed. Later they were found missing, and duplicate copies were made.

The existence of such complaints was further established by the testimony of James Vernon Hodges—which was, in substance, that he gave appellant $115 to pay and take care of four traffic tickets and later, in appellant's office, he saw the four complaints when appellant tore them up and put them in the trash.

It is further insisted that the evidence is insufficient because there was no proof that the four complaints were regular and valid on their face.

We do not construe Art. 1427, supra, as requiring that the state prove the papers on file and unlawfully taken were valid instruments.

Appellant lastly insists that his conviction cannot stand, under Art. 38.14, C.C.P., because it is based upon the testimony of the witness James Vernon Hodges, who was shown to be an accomplice as a matter of law and whose testimony was not sufficiently corroborated.

While the record shows that the witness Hodges went to appellant, who was holding himself out as a bondsman, for the purpose of having appellant pay off and take care of the four traffic tickets, the evidence does not show that as a matter of law Hodges was a party to the crime of unlawfully taking the complaints.

No issue was submitted to the jury as to whether the witness was an accomplice. Appellant is in no position to complain of the court's failure to submit such issue, in the absence of an exception to the court's charge or a request in writing, as requested by Arts. 36.14 and 36.15 of the Code of Criminal Procedure. Saith v. State, 415 S.W.2d 206. We overrule the contention and find the evidence sufficient to sustain the conviction.

Appellant's complaint to certain jury argument and of the court's action in permitting a witness to testify in the case, presented for the first time in his supplemental brief filed in this court, will not be considered as unassigned error, under Sec. 13 of Art. 40.09, C.C.P.

(Delivered February 14, 1968)

DICE, Judge

The judgment is affirmed.

CHESTER BASS, Appellant
v.
THE STATE OF TEXAS, Appellee

Appeal from Harris County
No. 41,055

OPINION
ON APPELLANT'S MOTION FOR REHEARING

Appellant urges that we consider as unassigned error his complaint that certain remarks of counsel for the state were comments upon his failure to testify.

Deprivation of a constitutional right will be reviewed in the interest of justice, though unassigned. McClellan v. State, 413 S.W.2d 391.

The claim of error advanced for the first time by supplemental brief filed in this court related to three remarks of counsel for the state in his opening argument: (1) "I would like to point out first of all the difference between the words justice and mercy. Is a person entitled to mercy unless he asks for it?" (2) "There wasn't any testimony brought to you to determine the guilt or innocence of this defendant from that side of the table," and (3) "Let me ask you if Velta Robinson wasn't in that person's office, why wasn't she here to testify?"

We do not agree that either of the above quoted remarks of counsel for the state necessarily constituted a direct or indirect reference to appellant's failure to testify.

As to the first complained of remark, it is observed that persons other than the accused, including his counsel, may ask for mercy for him and he himself may ask for mercy by means other than taking the stand as a witness.

The second remark can be reasonably applied to the failure of the defense to produce the witness Velta Robinson or other testimony than that of the defendant.

The third remark complained of clearly reflects that the reference was not to the failure of the defendant to testify but to the failure to produce Velta Robinson, an available witness.

> "For the argument to come within the mandatory prohibition of Art. 718, supra (now Art. 38.00 V.A.C.C.P.) it must be such as cannot be reasonably applied to the failure of the accused to produce other testimony than his own." Clark v. State, 362 S.W.2d 647. See also Ramos v. State, 419 S.W.2d 359, 367; Costilla v. State, 327 S.W.2d 593; Alford v. State, 255 S.W.2d 519; and cases cited under Art. 38.08 V.A.C.C.P., Note 77.

In Barrera v. State, 307 S.W.2d 948, there was no witness to refute the testimony of the state's witness other than the defendant Barrera.

We find no violation of Art. 38.08 V.A.C.C.P. or of appellant's rights under the self-incrimination provision of the 5th Amendment of the Constitution of the United States as construed by the Supreme Court in Griffin v. California, 380 U.S. 689, 14 L.Ed.2d 106, 85 S.Ct. 1229; and Chapman and Teale v. California, 286 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824.

Remaining convinced that the appeal was properly disposed of an original submission, appellant's motion for rehearing is overruled.

Woodley, Presiding Judge.

S* E* A* L

(Delivered April 3, 1968.)

APPENDIX "E"

STATE'S MOTION TO REVOKE PROBATION AND ORDER OF THE COURT THEREON

Filed: December 16, 1968

NO. 115,811

THE STATE OF TEXAS

v.

CHESTER BASS

In The 178th District Court Of
Harris County, Texas

TO THE HONORABLE JUDGE OF THE SAID COURT:

COMES NOW, THE STATE OF TEXAS, by and through her Assistant District Attorney, WILLIAM D. DARLING, and shows the Court that heretofore on the 14th day of June, 1968, the defendant was adjudged guilty of the offense of Theft of Filed Papers, and was accorded adult probation for a period of seven years conditioned among other things THAT said defendant commit no offense against the laws of this or any other state or the United States.

THE STATE WOULD FURTHER SHOW THE COURT that the defendant herein did then and there violate the terms and conditions of his probation in THAT defendant committed the offense of Misdemeanor Theft on or about August 31, 1968, in Harris County, Texas, by taking $45.00 from John Carter of Harris County,

Texas; THAT said defendant committed the offense of Misdemeanor Embezzlement on or about September 26, 1968, in Harris County, Texas, by taking $25.00 from John Carter of Harris County, Texas.

WHEREFORE, the State prays that capias issue and upon arrest that a hearing be given the defendant and that on hearing the probation be revoked.

WILLIAM D. DARLING
William D. Darling
Assistant District Attorney
Harris County, Texas

MOTION GRANTED AS PRAYED FOR and the Clerk is hereby ordered to issue alias capias for arrest of the defendant and that on arrest a copy of this motion be served on the defendant.

ENTERED this the 16th day of December, 1968.

DAN E. WALTON
Honorable Dan E. Walton, Judge
178th District Court
Harris County, Texas

ATTEST:

RAY HARDY
District Clerk
Harris County, Texas
BY: W. L. EVANS, Deputy

FILED: DECEMBER 16, 1968. RAY HARDY, District Clerk, Harris County, Texas. By: W. L. Evans, Deputy.

APPENDIX "F"

115811

NO.

CHESTER BASS 7/461 2/914

THE STATE OF TEXAS VS.

OFFENSE:
Theft of Filed Papers

FILED JUN 16 1965

CD4

SEP 1 1965 TRANSFERRED TO CD 6

ATTORNEY FOR STATE:
R. Hope
W. Stewart

ATTORNEYS FOR DEFENDANT:
J. Turner
E. Caldwell
~~Jabo Gibbleblood~~
CARL WILLIAMS

SCIRE FACIAS INFORMATION:

S. F. NO.

AMOUNT OF BOND $1000.00

BONDSMAN

SETTINGS:

OTHER INFORMATION:

GENERAL ORDER OF COURT

AUG 3 1965 Motion to quash. overruled in open court.

AUG 9 1965 Passed by the State.

SEP 2 1965 TRANSFERRED TO CD4 5/29.

MAR 3 1966 Both announce not ready. Files written motion for continuance which is granted by the Court

SEP 13 1966 State's motion (2nd) for continuance granted.

OCT 27 1966 Court overrules defendants motion for a list of witnesses summoned. Both sides ready. Jury selection begins 10:10 A.M. Jury selected & sworn 12:20 P.M. Defendant arraigned and enters a plea of "not guilty"

Witnesses sworn and testimony begins 1:35 P.M. Ruth invoked. Court recess 5:15 P.M.

OCT 28 1966 Testimony begins 10:40 A.M Court recesses at 5:45 P.M.

GENERAL ORDERS OF THE COURT

OCT 31 1966

[redacted]

OCT 31 1966 Testimony resumes 9:30 A.M. State rest 11:05 A.M. Defense Testimony Begins 1:00 P.M. 4:40 P.M. Defense rest. Court recessed at 5:15 P.M.

NOV 1 1966 9:00 Testimony resumed. 9:15 State rest Defense rest. Both sides rest & close Jury charged 1:00 P.M. Each side allowed 90 minutes for argument. Jury retires to deliberate 4:11 P.M. as to guilt. 5:15 P.M. guilty as charged.

Defendant elects to have the jury assess the punishment.

Testimony begins as to assessment of the punishment. 5:35 P.M. Both sides rest 5:55 P.M. Jury charged as to punishment. 6:20 P.M. Argument to the jury begins. Jury retires to deliberate as to punishment 6:40 P.M. Jury retires for the evening 9:00 P.M.

NOV 2 1966 Jury resumes deliberations 8:45 A.M. Verdict 7 years probation. Defendant placed on 7 years probation.

Ten days allowed to file motion for new trial - motion for new trial

[redacted]

filed 11-9-66 Amended motion filed 11-23-66 Set for 12-8-66

DEC 9 1966 Hearing on defendants original & 1st amended motion for new trial. Motion overruled - Defendant excepts & gives notice of appeal

40

NO. 115811

Chester Bass

THE STATE OF TEXAS VS.

OFFENSE:

ATTORNEY FOR STATE:
Bob Bennett
Wennard Earle White

ATTORNEYS FOR DEFENDANT:
John D. Dillard

SCIRE FACIAS INFORMATION:

S. F. NO.

AMOUNT OF BOND

BONDSMAN

SETTINGS:

OTHER INFORMATION:

FILED

GENERAL ORDER OF COURT

to the Court of Criminal Appeals
at Austin, Texas Bail $1000.00
5-27-68 mandate of affirmance received
JUN 12 1968 Defendant appeared in open
court w/counsel J. Turner & B. Caldwell
and

pending his abiding by and not
[illegible] of this sentence suspended and defendant placed on adult probation
[illegible] use of narcotics or habit-forming drugs and alcoholic beverages; (c) report [illegible]
[illegible] probation officer as directed; (d) Permit the probation officer to visit you at your home or elsewhere; (f) Work
[illegible] probation officer; (g) Remain within the limits of Harris County,
[illegible] the probation officer; (h) Support your dependents; (i) Not [illegible]
[illegible] only with permission from the probation officer; (k) Submit your [illegible]
[illegible] to any or several sums, and make restitution or reparation in any sum that the court shall determine, [illegible]

$100.00 supervisory fee to Harris County
at $10 per month to begin 7-1-68

DEC 16 1968 State filed Motion to Revoke Probation, Alias Capias and Precept to Serve Issued, the Court set Bail in the sum of $7,000.00, pending hearing to revoke probation.

MAR 20 1969
Defendant's Attorney Bobby Caldwell appeared in person and Reset to 5-29-69 for announcements.

41

GENERAL ORDERS OF THE COURT

MAY 29 1969

THE DEFENDANT, Bass APPEARED
IN PERSON WITH COUNSEL John Gilliland

Reset to 8-21-69 for announcements

AUG 21 1969

THE DEFENDANT, Bass APPEARED
IN PERSON WITH COUNSEL John Gilliland

Reset to Nov. 7, 1969 for hearing on motion to revoke probation

NOV 7 1969

THE DEFENDANT, Bass APPEARED
IN PERSON WITHOUT COUNSEL.

Reset by agreement to 12-5-69 for hearing on motion to revoke probation.
DEC 5 1969 Defendant appeared in person.
State announced ready. Attorney Bobby Caldwell orally moved
the Court to be relieved as attorney for Defendant. Defendant
in person advised the Court he did not oppose such Motion.
Court Granted such Motion.
Attorney John Gilliland orally moved the Court to be
relieved as attorney for Defendant. Defendant in person
advised the Court he did not oppose such Motion. Court

NO. 115811

CHESTER BASS

THE STATE OF TEXAS VS.

OFFENSE:

THEFT OF FILED PAPERS

ATTORNEY FOR STATE:

Warren White

ATTORNEYS FOR DEFENDANT:

Jim Parker

SCIRE FACIAS INFORMATION:

S. F. NO.

AMOUNT OF BOND

BONDSMAN

SETTINGS:

OTHER INFORMATION:

FILED JUN. 16, 1965

GENERAL ORDER OF COURT

Granted upon Motion of Defendant and Attorney Jesse Turner advised the Court that Attorney Jesse Turner has been employed as Defendant's Attorney of Choice. Defendant's oral Motion for Continuance was granted. Hearing set for February 9, 1970 at 9:00 A.M. Jesse Turner advised Court that he may have to be hospitalized on January 1970 for treatment & Witness Court Time appointed Attorney John Gilleland as Co-Counsel for Defendant

1-29-70 State filed First Amended Motion to Revoke Probation

Alias Capias and Precept to Serve Issued.

FEB 9 1970

THE DEFENDANT, Chester Bass APPEARED IN PERSON WITH COUNSEL John Gilleland

~~Attorney of Choice~~ and through counsel

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GENERAL ORDERS OF THE COURT

State announced ready for hearing on "The State's First Amended Motion to Revoke Probation" Defendant was announced ready by the Court and ordered to proceed with hearing. Witnesses were sworn and State's Direct Proof began at 10:30 A.M. At 11:45 A.M. Court recessed for lunch. At 2:00 P.M. State's Direct Proof resumed at 5:15 P.M. Court recessed.

FEB 10 1970

at 11:00 A.M. State's Direct Proof resumed 11:05 A.M. State rested. Defendant made oral motion for directed verdict for judgement which was overruled by Court. Defendant excepted. 11:40 A.M. Defendant's Direct Proof began 11:50 A.M. Court recessed. 2:30 P.M. Direct Proof of Defendant resumed, 4:10 P.M. Defendant rested. State recalled Deputy Sheriff Hughes. 4:30 P.M. State rested. Defendant rested. After hearing argument of counsel Court ordered State's First Amended Motion to Revoke Probation, Defendant was continued on probation on same terms and conditions heretofore imposed.

10-7-71 State filed Amended Motion to Revoke Probation, Alias Capias and Precept to Serve Issued.

JAN 6 1972

Reset to Jan 28, 1972 for hearing on State's Motion to Revoke Probation

JAN 28 1972

Case called. Defendant IN PERSON WITH COUNSEL James Farmer and Carl Williams, Paul at request of Defendant's Counsel (

Form No. C13080 3-69 Pg. 2 Reset to 2-11-72 for Hearing On State's Amended Motion to Revoke Probation

Defendant's oral objection to the State's Amended Motion to Revoke Probation filed this date was overruled. Defendant's oral motion to quash the State's Motion to Revoke Probation was overruled; 3:45 P.M. State's evidence began; 3:55 P.M. State rested. Defendant made oral motion for instructed verdict. State moved to reopen and such motion was granted. State's additional evidence was presented by State and State rested. Defendant's oral motion for an instructed verdict was overruled; 4:00 P.M. Defendant's evidence began; 4:35 P.M. Defendant rested. Court having heard and considered the evidence and arguments of counsel finds that Defendant violated the terms of Probation by commission of the offense of Misdemeanor Embezzlement on August 31, 1968, in Potter County, Texas, and revoked the Probation heretofore granted to Defendant. He defendant sentenced to not less than 2 years nor more than 7 years Confinement in the Texas Department of Corrections. To which the defendant objected and gave notice of appeal to the Court of Criminal Appeals of the State of Texas in Austin, Texas. The Court set bail in the sum of $7,000.00 pending appeal herein.

APPENDIX "G"

THE STATES FIRST AMENDED MOTION TO REVOKE PROBATION AND ORDER OF THE COURT THEREON

Filed: January 29, 1970

No. 115,811

THE STATE OF TEXAS

v.

CHESTER BASS

In The 178th District Court Of
Harris County, Texas

THE STATES FIRST AMENDED MOTION TO REVOKE PROBATION

TO THE HONORABLE JUDGE OF THE SAID COURT:

COMES NOW, THE STATE OF TEXAS, by and through her Assistant District Attorney, WILLIAM W. BURGE, and shows the Court that heretofore on the 14th day of June, 1968, the defendant was adjudged guilty of the offense of Theft of Filed Papers, and was accorded adult probation for a period of seven years conditioned among other things THAT said defendant commit no offense against the laws of this or any other state or the United States.

THE STATE WOULD FURTHER SHOW THE COURT that the defendant herein did then and there

violate the terms and conditions of his probation in THAT said defendant committed the offense of Misdemeanor Embezzlement on or about August 31, 1968, in Harris County, Texas, by taking $45.00 from John Carter of Harris County, Texas.

WHEREFORE, the State prays that capias issue and upon arrest that a hearing be given the defendant and that on hearing the probation be revoked.

WILLIAM W. BURGE
William W. Burge
Assistant District Attorney
Harris County, Texas

MOTION GRANTED AS PRAYED FOR and the Clerk is hereby ordered to issue alias capias for arrest of the defendant and that on arrest a copy of this motion be served on the defendant.

ENTERED this the 29 day of January, 1970.

DAN E. WALTON
Hon. Dan E. Walton, Judge
178th District Court
Harris County, Texas

ATTEST:

RAY HARDY
District Clerk
Harris County, Texas
By: W. L. EVANS, Deputy

Filed January 29, 1970

APPENDIX "H"

AMENDED MOTION TO REVOKE PROBATION AND ORDER OF THE COURT THEREON

Filed: October 7, 1971

NO. 115,811

THE STATE OF TEXAS

v.

CHESTER BASS

In The 178th District Court Of
Harris County, Texas

AMENDED MOTION TO REVOKE PROBATION

TO THE HONORABLE JUDGE OF THE SAID COURT:

COMES NOW, THE STATE OF TEXAS, by and through her Assistant District Attorney, WILLIAM W. BURGE, and shows the Court that heretofore on the 14th day of June, 1968, the defendant was adjudged guilty of the offense of THEFT OF FILED PAPERS, and was accorded adult probation for a period of seven (7) years conditioned among other things THAT said defendant commit no offense against the laws of this or any other State or the United States; and THAT said defendant remain within the limits of Harris County, Texas, and change place of residence only with permission from the probation officer.

THE STATE WOULD FURTHER SHOW THE COURT that the defendant herein did then and there violate the terms and conditions of his probation in THAT

said defendant committed the offense of MISDEMEANOR EMBEZZLEMENT on or about August 31, 1968, in Harris County, Texas; and THAT said defendant committed the Misdemeanor Offense of Failure to Appear in Violation of Bail Bond on or about August 7, 1971, in that the defendant knowingly and willfully failed to appear within thirty (30) days following August 7, 1971, the date that his bail was forfeited in Cause No. 252,636, in County Criminal Court at Law No. 1 of Harris County, Texas; and THAT said defendant left Harris County, Texas without the permission of the probation officer.

WILLIAM W. BURGE
William W. Burge
Assistant District Attorney
Harris County, Texas

MOTION GRANTED AS PRAYED for and the Clerk is hereby ordered to issue Alias Capias for arrest of the defendant and that on arrest a copy of this motion be served on the defendant.

ENTERED this the 7 day of October, 1971.

PENN J. JACKSON
Hon. Penn Jackson, Presiding Judge
178th District Court
Harris County, Texas

ATTEST:

RAY HARDY
District Clerk
Harris County, Texas
By: W. L. EVANS, Deputy

Filed October 7, 1971

(Court Seal)

APPENDIX "I"

AMENDED MOTION TO REVOKE PROBATION AND ORDER OF THE COURT THEREON

Filed: February 18, 1972

NO. 115,811

THE STATE OF TEXAS

v.

CHESTER BASS

In The 178th District Court Of
Harris County, Texas

AMENDED MOTION TO REVOKE PROBATION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, THE STATE OF TEXAS, by and through her Assistant District Attorney, BERT GRAHAM, and shows the Court that heretofore, on the 1st day of November, 1966, the defendant was adjudged guilty of the offense of THEFT OF FILED PAPERS, and on the 14th day of June, 1968, the defendant was accorded adult probation for a period of seven (7) years conditioned among other things that said defendant commit no offense against the laws of this or any other State or the United States; and That said defendant remain within the limits of Harris County, Texas, and change place of residence only with permission from the probation officer.

THE STATE WOULD FURTHER SHOW THE COURT that the defendant herein did then and there violate the terms and conditions of his probation in

THAT said defendant committed the offense of MISDEMEANOR EMBEZZLEMENT on or about August 31, 1968, in Harris County, Texas; and THAT said defendant committed the Misdemeanor Offense of Failure to Appear in Violation of Bail Bond on or about August 7, 1971, in that the defendant knowingly and willfully failed to appear within thirty (30) days following August 7, 1971, the date that his bail was forfeited in Cause No. 252,636, in County Criminal Court at Law No. 1 of Harris County, Texas; and THAT said defendant left Harris County, Texas, without the permission of the probation officer.

BERT GRAHAM
Bert Graham
Assistant District Attorney
Harris County, Texas

MOTION GRANTED AS PRAYED for and the Clerk is hereby ordered to issue Alias Capias for arrest of the defendant and that on arrest a copy of this motion be served on the defendant.

ENTERED this the 18 day of February, 1972.

DAN E. WALTON
Hon. Dan E. Walton, Judge
178th District Court
Harris County, Texas

ATTEST:

RAY HARDY
District Clerk
Harris County, Texas
By: W. L. EVANS, Deputy

Filed February 18, 1972

APPENDIX "J"

The Court: All right. In this Cause No. 115,811, State of Texas vs. Chester Bass, is the State ready to proceed?

Mr. Graham: Yes, sir, Your Honor.

The Court: Is the Defense ready to proceed?

Mr. Turner: Yes, sir, Your Honor.

The Court: All right. The record in this case now reflects that the State has this date filed an Amended Motion to Revoke Probation and, Mr. Turner, I would inquire if the Defendant has been furnished a copy of same.

Mr. Turner: Yes, Your Honor, we have been furnished a copy of this Amended Motion to Revoke Probation this date, and we would waive notice and the ten days' time, or whatever time we were entitled to, and we respectfully request the Court that we be allowed to proceed today instead of delaying it to a later date. I would also like the record to show in addition to myself as his Counsel that the Defendant also agree to this amended motion being filed today and going to trial today.

The Court: Will you stand up, Chester Bass? Is this also your desire in the matter as recited by your Counsel?

The Defendant: It is, Your Honor.

The Court: All right. Since a copy has been served on Counsel and the Defendant, Mr. Turner, I would inquire whether the Defendant waives any reading of the motion.

Mr. Turner: Your Honor, we would waive the reading of the motion, but before we proceed the Defendant has a motion to present orally to the Court.

The Court: All right. You may proceed.

Mr. Turner: In connection with this, and we would first direct our exception to the amended Motion to Revoke Probation that has just been mentioned for the several reasons that the allegations are vague and indefinite and that it does not inform him sufficiently as to what he is alleged to have done in violation of the terms of probation and does not charge him with violation of the law sufficiently so that he may properly defend himself, and directing the Court's attention to paragraph two of the motion, it alleges the Defendant committed the offense of misdemeanor embezzlement on or about August 31, 1968, in Harris County, Texas, and it does not in anywise, and we would have to go upon our speculation, the Court, myself, the Defendant and everyone else would have to speculate with the State that they may be talking about the alleged offense that was brought before the Court on a prior Motion to Revoke Probation in which we had a Motion to Revoke Probation alleging an offense that occurred on August 31, 1968, that was brought to the attention of the Court and the motion was heard by the Court on February 9, 1970, in which this Court denied the motion, but it would be pure speculation on our part and does not advise the Defendant in plain and intelligible language that this is the offense as it does not say as it previously alleged in the other complaint, the Motion to Revoke Probation heard back in 1970, it alleged he committed the offense of 1968, in somewhat the words to the effect he embezzled the sum of forty-five dollars from a person named Carter, but I submit to the Court that this allegation is entirely insufficient under the law to apprise this Defendant as to whether or not the State is going upon the particular

allegations that we went on before or whether they are alleging some other offence of misdemeanor embezzlement that occurred allegedly on or about August 31, 1968, and for those reasons, we suggest to the Court that the pleadings are insufficient and that the motion should be denied for those reasons. I have nothing further in connection with that motion, and after the Court's ruling I would have another motion.

The Court: That's overruled.

Mr. Turner: Your Honor, in connection with this matter, we would—the Defendant would submit to the Court that the State by a prior allegation had alleged this same identical matter, the offense of misdemeanor embezzlement on or about August 31, 1968, and that the Court heard all of the evidence submitted in connection with that and that the State's motion was denied at the hearing had by this Court on or about February 9th of 1970, and that to again cause him to answer to the same allegation and to charge him with the same matter again that it would constitute double jeopardy and he does respectfully plead double jeopardy in that the matter has already been adjudicated by this Court who is the Court who has competent jurisdiction over this Defendant and that it is res adjudicata. This matter they allege insofar as the offense of misdemeanor embezzlement that allegedly occurred August 31, 1968 has already been adjudicated by this Court and, Your Honor, in connection with that, I would like to offer a complete statement of facts in connection with this motion constituting the record that was made by the Official Court Reporter of this Court and certified by her on the 9th day of April, 1970, constituting all of the testimony that was presented before

this Court at the hearing on the State's prior Motion to Revoke Probation. May we have this marked as an exhibit?

(Whereupon the Court Reporter marked Defendant's Exhibit No. 1 for identification purposes.)

Mr. Graham: We have no objection.

The Court: All right. It will be admitted as evidence in support of his exception to the Motion to Revoke Probation.

(Whereupon Defendant's Exhibit No. 1 was admitted in evidence, a copy of said exhibit being attached hereto and made a part of this record.)

Mr. Turner: Your Honor, that's not exactly—if I may restate my position to add to my position as previously stated.

The Court: All right.

Mr. Turner: This is in connection with the Defendant's plea of double jeopardy, that it's res adjudicata, that the judge has already ruled on the very same matter as before the Court this date in the State's amended Motion to Revoke Probation, that that has already been adjudicated and it constitutes double jeopardy, and for that reason we are including this. It's not in connection to any exception to any ruling of the Court as it is my understanding the Court has not ruled on this motion concerning double jeopardy.

The Court: Do I understand that you are moving to quash the motion and proceedings on that basis? Is that what you are—

Mr. Turner: We are moving to quash it, that it be dismissed, that it be denied. The Defendant pleads double jeopardy. It's res adjudicata. The very same identical matter they propose to submit to the Court has already been submitted to the Court and already adjudicated by the Court.

The Court: I will admit the exhibit in connection with the motion stated by the Counsel. Does that conclude your motion?

Mr. Turner: Right at this time.

The Court: Your motion is overruled. Any further matters, Mr. Turner?

Mr. Turner: Not at this time in connection with any motions or anything. We are ready to proceed.

The Court: All right. Then the State may proceed.

Mr. Graham: Your Honor, at this time we would offer into evidence what has been marked Defendant's Exhibit No. 1 for the purpose of this hearing.

The Court: Do you have any objection to that?

Mr. Turner: No, Your Honor, I have no objection at all. It was offered in connection with a motion, and we agree with the State to offer it in connection with this hearing.

The Court: All right. It's admitted for the purpose of this hearing. Has it been marked?

Mr. Graham: I will have it.

APPENDIX "K"

BILL HARLAN,

called as a witness on the behalf of the Defendant, after having first been duly sworn, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Turner:

Q. State your name, please.

A. Bill Harlan.

Q. Mr. Harlan, how are you employed and what is your position?

A. Unit Supervisor assigned to the 178th District Court serving with the Adult Probation Department, Harris County, Texas.

Q. And in such position do you have occasion to know the Defendant, Chester Bass?

A. Yes.

Q. Has he been under your supervision for the last few years?

A. More specifically he has been under my supervision since May of 1971.

Q. And to your knowledge prior to that was he under the supervision of someone else in the Harris County Probation Department?

A. Yes.

Q. Calling your attention to the matter before this Court in which there is an amended Motion to Revoke the Probation that was granted to this Defendant back—he was placed on probation June 14, 1968, from a conviction wherein he was adjudged guilty of theft of filed papers on the 1st of November, 1966, and granted seven years' probation. Are you familiar with that?

A. Yes, sir, I am.

Q. In connection with this motion that has been recently filed and which is in Court today, did you suggest the filing of this or instigate the filing of it yourself?

A. No, sir, I did not.

Q. Did someone under your supervision in the Adult Probation Department to your knowledge suggest the filing of this Motion to Revoke Probation?

A. No, sir, not to my knowledge.

Q. Now, in connection with this Motion to Revoke Probation, understanding that all matters submitted is entirely at the discretion of the Court, would you have any objection or any opinion to state therein if the Court saw fit to continue this probation?

Mr. Graham: Objection. That's the province of the Court.

The Court: Well, I overruled the objection. I will permit him to answer.

A. (By Witness) If the Court should see fit to continue the probation, I would have no objection.

Q. (By Mr. Turner) All right. As far as the records of your department are concerned and to your knowledge, has—during the period of time you have been his Probation Officer, has he complied with your request and has he complied with the instructions and as far as you know complied with the terms of his probation?

A. Yes, sir, he has.

Q. On occasions I would ask you if your record reflects he has contacted the Probation Department at times that he was not even ordered to but on occasions to ask permission of the Probation Office—you have specifically a record where he asked permission to leave

the County to go to his mother's funeral?

A. Would that be since May, 1971?

Q. Sometime back in February of 1970. Sometime in that area. January or February of 1970?

A. Yes, sir. I have a memo, memorandum dated January 23, 3:15 p.m. wherein the Defendant, Chester Bass, called the Adult Probation Department trying to contact Mr. Jerry Hall, his former Probation Officer, stating his mother was very ill in Corsicana Memorial Hospital and that he was asking permission to go there to be at her bedside and that he would return and let them know when he did return.

Q. Now, does your record reflect that previously this Defendant was charged with the offense of misdemeanor embezzlement in County Court No. 1 and an offense alleged to have occurred in 1968, and that he was convicted there and this case was on appeal and that thereafter it was affirmed and it was—given punishment of six months in jail and a fine of five-hundred dollars and costs? Are you familiar with that?

A. I am familiar with that.

Q. Does your record in the period of time from the time of the mandate from the Court of Criminal Appeals in Austin, from the date of about the 31st of March of 1971 and the mandate returned on the 2nd of April, 1971, were you familiar with this mandate of affirmant on that case?

A. Not from personal knowledge, but it was related to me that this had transpired.

Q. Does your record reflect that Mr. Bass had occasion at times after that date in April, 1971, to be in your office or at the Office of the Adult Probation Department?

A. What date was that again?

Q. Any time after April, 1971, did Chester Bass come by and discuss with either you or other persons various matters pertaining to his probation prior to the time he was arrested in October of 1971?

A. If I understand the question, am I aware of his coming to my office after April of 1971 and prior to—

Q. Some date in October of 1971. During this period of time in 1971, does your record reflect him coming to the office for a conference or anything else? It would be perhaps in September that he was in your office.

A. September of 1971?

Q. Yes, sir.

A. I have no records that he was in the office in September of 1971—just a moment. I was looking at 1970 reports. Oh, yes, sir, it does.

Q. And on what date was that?

A. He came into our office on September 1st—no—yes, sir.

Q. During all this period of time, did he continue to make whatever reports were required or suggested that he make during all the period of time?

A. Yes, sir.

Q. Are you familiar with the fact that he was thereafter—arrested on or about October 26 and placed in the Harris County Jail to serve this six months and the fine of five-hundred dollars plus costs?

A. Yes, sir, I am familiar with that.

Q. Are you familiar with the fact that he has been in jail constantly since that time in connection with that cause?

A. Yes, sir.

Q. Did the Defendant or a representative of the Defendant inform you that he had been placed in jail?

A. Yes, sir.

Mr. Turner: Pass the witness.

Mr. Graham: I have no questions, Your Honor.

Mr. Turner: I have nothing further of this witness, but I would like a moment's conference with the Defendant before I make an announcement.

(At this time there was a short delay in the proceedings, after which the following proceedings were made of record.)

Mr. Turner: Your Honor, at this time the Defendant rests.

The Court: Anything further from the State?

Mr. Graham: The State rests, Your Honor.

The Court: Do you wish to be heard from by way of argument before the Court rules on the matter, gentlemen?

APPENDIX "L"

CONSTITUTION OF THE UNITED STATES

Fifth Amendment

"No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

APPENDIX "M"

CONSTITUTION OF THE UNITED STATES

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

APPENDIX "N"

CONSTITUTION OF THE UNITED STATES

Fourteenth Amendment, Section 1.

"* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

LIBRARY
SUPREME COURT, U. S.
FEB 20 1974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1099

CHESTER BASS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari
To The Court of Criminal Appeals of Texas

BRIEF IN OPPOSITION

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
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JOE B. DIBRELL
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1099

CHESTER BASS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition for Writ of Certiorari
To The Court of Criminal Appeals of Texas

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, for which review is sought here, is reported in *Bass* v. *State*, 501 S.W.2d 643 (1973). A copy of the opinion is attached to the Petition herein.

JURISDICTION

The formal jurisdictional requisites of the petition and its timely filing would appear to be satisfied although Respondent disputes Petitioner's contention that any rights guaranteed by the Constitution of the United States have been denied.

QUESTIONS PRESENTED

(1) Whether the Court of Criminal Appeals of Texas properly affirmed the judgment of the state district court below as Petitioner failed to present the issue of notice to the court on direct appeal?

(2) Whether Petitioner had sufficient notice that he had violated a condition of his probation so as not to deprive him of due process of law?

(3) Whether the Court of Criminal Appeals of Texas properly held that Petitioner's constitutional right not to be placed twice in jeopardy for the same offense was not violated when the trial court revoked his probation in a second probation revocation proceeding?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner contends that the Fifth, Sixth and Fourteenth Amendments to the Constitution of the

United States are involved, as well as Article 1427, Texas Penal Code (1925) and Article 42.12, Texas Code of Criminal Procedure. These provisions are included in the appendix of the Petition herein.

Respondent believes that Article 40.09, Texas Code of Criminal Procedure and Rule 9, Rules of the Court of Criminal Appeals of Texas are also involved, and Respondent has included these provisions in the appendix to this Brief in Opposition.

STATEMENT OF THE CASE

The Petition for the Writ of Certiorari results from the affirmance by the Court of Criminal Appeals of Texas of an order of the 178th Judicial District Court of Harris County, Texas revoking Petitioner's probation. On October 27, 1966 Petitioner was convicted of theft of filed papers pursuant to Article 14.27, Texas Penal Code (1925), and Petitioner was assessed a seven years probated sentence. One of the terms of Petitioner's probation was that he violate no law. Petitioner's probation was revoked on February 18, 1972, after the trial court conducted a hearing and found that the Petitioner had committed the offense of misdemeanor embezzlement.

Petitioner's original conviction occurred on December 16, 1964, and this conviction was affirmed on appeal on February 14, 1968. See *Bass* v. *State*, 427

S.W.2d 624 (Tex.Crim.App. 1968). The subsequent misdemeanor embezzlement offense was committed by the Petitioner on or about August 31, 1968. The state then filed a motion and subsequent motions to revoke probation, the first motion being filed on December 16, 1968. The cause was originally set for March 20, 1969, but the cause was subsequently reset five times and a hearing was finally held on February 9, 1970. After hearing the evidence, the trial court in its discretion refused to revoke the probation, and the probation remained in effect under the original terms and conditions.

On January 20, 1971, the Court of Criminal Appeals of Texas affirmed Petitioner's misdemeanor embezzlement conviction in *Bass* v. *State*, 464 S.W.2d 668 (Tex.Crim.App. 1971). On October 7, 1971, the state then filed an amended motion to revoke probation. The cause was set for a hearing on January 6, 1972, but it was subsequently reset three times and heard on February 18, 1972. The hearing resulted in Petitioner's probation being revoked. Petitioner then appealed to the Court of Criminal Appeals of Texas, and his brief primarily raised the question of double jeopardy as a result of the state's motions to revoke probation which alleged the same offense. The Petitioner in his brief in that court made no mention of the question of adequate notice. It was only after the Court of Criminal Appeals of Texas handed down its opinion that Petitioner attempted to present the notice issue to the court.

I.

ARGUMENT AND AUTHORITIES

Whether the Court of Criminal Appeals of Texas properly affirmed the judgment of the state district court below as Petitioner failed to present the issue of notice to the Court on direct appeal.

Petitioner complains that he was not given adequate notice that he had violated a condition of his probation, but Respondent would show that Petitioner never presented this point to the Court of Criminal Appeals of Texas on appeal, therefore Petitioner effectively waived this contention. On page 8 of Petitioner's Petition for Writ of Certiorari, he admits that he did not present the question of whether he was given sufficient notice to the Court of Criminal Appeals in his original appeal of this cause. Petitioner then states that he presented this issue in his motion for rehearing, which he admits that he did not have a statutory right to file. Petitioner effectively waived his right to present the question of waiver to the Court of Criminal Appeals of Texas, and now he attempts to argue that this issue was adequately presented to that Court.

Article 40.09 of the Texas Code of Criminal Procedure, Section 9 provides in regard to the filing of the Defendant's brief:

"This brief shall set forth separately each ground of error which Defendant desires to complain on

appeal and may set forth such argument as he deems appropriate. Each ground of error shall briefly refer to that part of the ruling of the trial court, charge given to the jury, or charge refused, admission or rejection of evidence or other proceedings which are designated to be complained of in such a way as that the point of objection can be clearly identified and understood by the court. If the Defendant includes in his brief arguments supporting a particular ground of error they shall be construed with it in determining what point of objection is sought to be presented by such ground of error; and if the court, upon consideration of such ground of error in the light of the arguments made in support thereof in the brief, can identify and understand such point of objection the same shall be reviewed not withstanding any generality, vagueness or other technical defect that may exist in the language employed to set forth such ground of error." (See Appendix to this Brief in Opposition for complete text).

A review of the state trial record reveals that the Petitioner complained in the trial court of the question of notice, but simply failed to preserve this point on appeal.

The Court of Criminal Appeals of Texas has promulgated rules of procedure pursuant to Article 44.33 of the Texas Code of Criminal Procedure. The court has promulgated Rule 9 which provides in part "Motions for rehearing may not be filed as a matter of right." (The text of Rule 9 has been set out in the Appendix to this Brief in Opposition). It is clear that the

Petitioner did not present this point of error to the Court of Criminal Appeals, and therefore the point was waived as Petitioner's mere filing of the point in a motion for rehearing did not place this point before the court.

It is clear that under state procedure, Petitioner did not present the question of notice to the Court of Criminal Appeals in a proper and timely manner. While it is conceded that no particular form of words or phrases is necessary, the claim must be brought to the attention of the state court with fair precision and in due time. *Street* v. *New York*, 394 U.S. 576 (1968); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63 (1928). The record in the instant case fails to show that Petitioner presented the question of notice to the Court of Criminal Appeals of Texas, and as such the Petition should not be granted. *Newsom* v. *Smyth*, 365 U.S. 604 (1961).

II.

The Petitioner had sufficient notice that he violated a condition of his probation so as not to deprive him of due process of law.

Even if Petitioner presented the question of notice to the Court of Criminal Appeals, he has not shown any deprivation of a federal constitutional right as he had sufficient notice of why his probation was being revoked. It must be remembered that the state trial

court revoked Petitioner's probation on February 18, 1972. Probation was revoked, after Petitioner was afforded a hearing. Petitioner had counsel during the revocation hearing. Respondent concedes that Petitioner did not have a preliminary hearing, but Petitioner was not harmed by the failure to provide such a hearing. Furthermore, the probation revocation having taken place February 18, 1972, was held prior to this Court's decisions in *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) and *Gagnon* v. *Scarpelli*, ___ U.S. ___, 93 S.Ct. 1756 (1973). It is Respondent's position that *Morrissey* does not apply retroactively, especially based on this Court's statement that it was to apply ". . . to future revocations of parole . . ." (408 U.S. at 490). See *Valdez* v. *Perini*, 474 F.2d 19 (6th Cir. 1973); *M'Clary* v. *California Adult Authority*, 466 F.2d 1122 (9th Cir. 1972); *Ex parte Ates*, 487 S.W.2d 353 (Tex.Crim.App. 1972).

There can be no question that Petitioner was entitled to notice of the revocation hearing and the reason for it, but it is clear that he had adequate notice from the state's pleadings to determine which criminal offense he had committed in violation of the conditions of his probation.

In each amended motion to revoke probation, which are attached to the Appendix of the Petition herein, the state alleged that the defendant had committed "the offense of misdemeanor embezzlement on or about

August 31, 1968, in Harris County, Texas . . ." The state's original motion and first amended motion to revoke probation further specified that the embezzlement resulted from Petitioner's taking $45.00 belonging to John Carter. It can hardly be argued that Petitioner did not have notice of the charge which was being used to revoke his probation.

In light of the circumstances, Petitioner is in no position to complain of lack of notice. It is clear that a motion to revoke under Texas law does not have to have the same particularity as contained in an indictment. *Kinard* v. *State*, 477 S.W.2d 896 (Tex.Crim.App. 1972). In each motion and amended motion to revoke probation, the state sufficiently alleged sufficient information to put Petitioner on notice of why his probation was being revoked. See *Campbell* v. *State*, 456 S.W.2d 918 (Tex.Crim.App. 1970).

III.

The Court of Criminal Appeals of Texas properly held that Petitioner's constitutional right not to be placed twice in jeopardy for the same offense was not violated when the trial court revoked his probation in a second probation revocation proceeding.

It is Respondent's contention that the question of double jeopardy is not applicable to parole revocation proceedings. See *Dunn* v. *California Department of Corrections*, 401 F.2d 340 (9th Cir. 1968).

As was stated in *Barber* v. *State*, 486 S.W.2d 352 (Tex.Crim.App. 1972):

> "A hearing upon a motion to revoke probation is addressed to the trial court's discretion in determining whether the probation shall be revoked or continued. The result of such hearing is neither conviction nor acquittal. (See McDonald v. State, 393 S.W.2d @ 14; Soliz v. State, 171 Tex.Cr.R. 376, 350 S.W.2d 566, 567). Thus Appellant's contention of jeopardy is without merit." 486 S.W.2d at 354.

It is clear from the above case that under Texas law, the hearing on a motion to revoke probation is a function of the trial court's discretion and involves only the question of whether the probation should be continued. At the first hearing, there had been no final conviction and the trial court declined to revoke even though under Texas law a revocation of probation may take place before a person has been convicted for the offense for which his probation was revoked. *Farmer* v. *State*, 475 S.W.2d 753 (Tex.Crim.App. 1972). Even though it was within the trial court's discretion to revoke the probation, the trial court exercised its discretion so as to continue the probation should the charges against the Petitioner subsequently either be dismissed or the Petitioner be acquitted of them. The trial court upon the filing of the state's amended motion to revoke probation after Petitioner's subsequent conviction for the misdemeanor embezzlement charge, held a hearing at which time the testimony adduced at the first hearing was admitted without objection. The state, in addition,

offered the information, judgment and sentence, and the mandate of affirmance of Petitioner's conviction for misdemeanor embezzlement. These additional instruments were admitted into evidence by the trial court. As a result, the trial court revoked the probation. Respondent submits that it would be unfortunate to punish the action of the trial court which attempted to protect the Petitioner by refusing to revoke his probation until the court had evidence that the offense for which the probation was revoked was a final conviction.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant

JOE B. DIBRELL
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ARTICLE 49.09, TEXAS CODE OF CRIMINAL PROCEDURE

9. Defendant's brief

Within thirty days after approval of the record by the court, or within such additional period as the court may in its discretion authorize, the defendant shall file with the clerk of the trial court his appellate brief. This brief shall set forth separately each ground of error of which defendant desires to complain on appeal and may set forth such arguments as he deems appropriate. Each ground of error shall briefly refer to that part of the ruling of the trial court, charge given to the jury, or charge refused, admission or rejection of evidence or other proceedings which are designated to be compalined of in such way as that the point of objection can be clearly identified and understood by the court. If the defendant includes in his brief arguments supporting a particular ground of error they shall be construed with it in determining what point of objection is sought to be presented by such ground of error; and if the court, upon consideration of such ground of error in the light of arguments made in support thereof in the brief, can identify and understand such point of objection the same shall be reviewed notwithstanding any generality, vagueness or other technical defect that may exist in the language employed to set forth such ground of error.

RULES OF THE COURT OF CRIMINAL APPEALS

Rule 9. Motions for rehearing and leave to file, written argument; setting case for resubmision

Motions for rehearing may not be filed as a matter of right. Any party desiring a rehearing of any matter determined by the Court must, within fifteen days after the opinion is handed down, present to the Clerk a motion for rehearing, distinctly specifying the grounds relied on for a rehearing, accompanied with a motion for a leave to file, and such written argument in behalf of the motion as may be desired; and nine copies of all such papers shall be presented to the Clerk for distribution to the Judges and Commissioners of the Court. The party presenting the motion for leave to file shall certify that copies of the motion for leave to file, motion for a rehearing and argument, if any, have theretofore been delivered to the opposite party. The motion for leave to file shall be filed by the Clerk, and together with the motion for rehearing and written argument, if any, will be submitted for action of the Court. The Court may request the opposite party to submit a reply, and in that event the Clerk will so advise such party. If the Court concludes for any reason that a reply should not be requested, it will act upon the motion without giving prior notice to the opposite party. If as many as two members of the Court are of the tentative opinion that the motion for a rehearing should be granted in whole

or in part, the motion for leave to file will be granted, the motion for rehearing will be filed, and the case will be placed upon the docket and will be thereafter set for a resubmission to the Court. Otherwise, the motion for leave to file will be overruled, and the motion for a rehearing will not be filed. If the motion for a leave to file is ranted, the Clerk will give notice to all counsel of record of the filing of the motion for rehearing by mail, or give such other notice as may be ordered by the Court. Any motion for rehearing may be amended, with leave of the Court, any time before its final disposition. When a case is set for resubmission on motion for rehearing, the Clerk will give all counsel of record notice of such setting. However, when a case is set for resubmission on motion for rehearing, oral argument will be allowed only upon invitation from the Court upon the grounds specified by the Court, and ordinarily anyone so invited to present oral argument will be limited to fifteen minutes, with it being understood that the Court may, in its discretion, limit or extend the time for such oral argument.

CERTIFICATE OF SERVICE

I, Lonny Zwiener, Assistant Attorney General of Texas, do hereby certify that a copy of the above and foregoing Brief in Opposition has been deposited in the United States mail, first class, certified and postage prepaid, on this the ___ day of February, 1974, to the following address: Mr. Marvin O. Teague, Attorney and Counselor at Law, 999 State National Building, 412 Main, Houston, Texas 77002.

LONNY ZWIENER
Assistant Attorney General

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IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1099

CHESTER BASS, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF AND OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1973

NO. 73-1099

CHESTER BASS, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF AND OPPOSITION

The Petitioner, CHESTER BASS, makes and files, by Counsel, this PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF AND OPPOSITION and for grounds therefor would show the following:

I.

Petitioner, with due apologies to the Court, failed to point out that Art. 40.09, Section 13, Vernon's Annotated Texas Code of Criminal Procedure, provides:

> Upon refusal of the [trial] court to grant defendant a new trial, the clerk shall thereupon promptly transmit the record and briefs to the Court of Criminal

> Appeals, in which court all grounds of error and arguments in support thereof urged in defendant's brief in the trial court shall be reviewed, *as well as any unassigned error which in the opinion of the Court of Criminal Appeals should be reviewed in the interest of justice.* (Emphasis added).

The Court of Criminal Appeals, to the knowledge of this Petitioner's counsel, has never defined the phrase "in the interest of justice." By the cases, it is not the same as "of Constitutional dimensions" although it may be; nor is it "fundamental error" although it may be; and, in general, it is submitted, it is whatever the majority of the voting members of the Court deem it to be, including but not limited to Counsel even raising the ground of error either on direct appeal or in an Application For Leave to File the Motion for Rehearing or what was previously simply the Motion for Rehearing. For example, in the early case of *McClellen v. State,* 1967, 413 S.W.2d 391, then Presiding Judge Woodley said:

> For this Court to review any ground of error urged in the defendant's brief filed in the trial court other than such as in the opinion of this Court should be reviewed as unassigned error would be to ignore the salutary provisions of the 1965 Code whereby the trial judge is allowed full opportunity to examine the completed record, hear arguments and study briefs and grant a new trial to the same extent as would this Court should he decide that the defendant should not be permitted to withdraw his notice of appeal.
>
> We hold that in declining the trial judge's decision permitting him to withdraw his appeal and be granted a new trial, appellant waived all grounds of error

> save those which may be considered by this Court as unassigned errors.
>
> Deprivation of constitutional right such as set forth in defendant's brief as his first ground of error is, in the opinion of this Court, an error which should be reviewed in the interest of justice, though unassigned.

Later, in *Keel v. State*, 1968, 435 S.W.2d 687 (690), Judge Dice said:

> Upon the refusal of the trial court to grant a new trial, it becomes the duty of this court to review the rulings of the trial judge, in light of the record and the briefs, and any unassigned error which in the opinion of this court should be reviewed in the interest of justice. Art. 40.09-13, supra.
>
> The Court of Criminal Appeals is not bound to confine itself to the record sent up by the trial court in passing upon a federal claim, such as denial of a constitutional right. White v. State, Tex. Cr. App., 410 S.W.2d 440.

In *Duckett v. State*, 1970, 454 S.W.2d 755, (758), the Court reversed even though the ground of error on which the case was reversed was not even submitted by counsel for that defendant; in fact, he determined the appeal to be frivolous and without merit. Now Presiding Judge Onion said:

> The question here presented was not raised as an error that "might arguably support the appeal" in appellant's counsel's brief in which he determined the appeal to be frivolous or in the pro se brief except as the same might be germane to the general claim of the ineffective assistance of counsel.

> We are not precluded from reviewing the same, however, since the question involves both a violation of the State as well as the Federal Constitutions and would certainly require our review "in the interest of justice." See Article 40.90, Sec. 13, V.A.C.C.P.

In fact, counsel for an appellant does not even have to raise the ground of error if the Court sees fit to review it "in the interests of justice." In *Thomas v. State*, 1971, 474 S.W.2d 236 (237), the Court reversed because the complaint on which an information was founded was fatally defective. There, Commissioner Dally said:

> In the interest of justice the fundamental errors which have been designated above but which were not assigned as grounds of error in a brief filed in the trial court have been considered under the provisions of Art. 40.09, Sec. 13, Vernon's Ann. C.C.P.
>
> The judgment is reversed and the prosecution ordered dismissed.

In *Stoddard v. State*, 1972, 475 S.W.2d 744 (746), a search warrant case, which was reversed, Judge Roberts of the Court said:

> Appellant raises only one ground of error in his untimely filed brief. He contends that the trial court erred in admitting evidence which was obtained as the result of a search of his automobile. He contends that the search was unlawful because of a defective search warrant and that probable cause did not exist for the issuance of the warrant. This ground of error will be considered as unassigned error. Art. 40.09, § 13, V.A.C.C.P.; Heltzel v. State, 462 S.W.2d 289 (Tex. Cr. App. 1971); Dodd v. State, 436 S.W.2d 149 (Tex. Cr. App. 1969); Johnson v. State, 436 S.W.2d 906 (Tex. Cr. App. 1968).

Again, if the majority of the voting members of the Court of Criminal Appeals deems some ground of error should be reviewed in the interest of justice, whether raised or not, timely or not timely, it will be reviewed, but not otherwise. This is true even on Motion for Rehearing. In *Renn v. State*, 1973, 495 S.W.2d 922 (924), the Court, on rehearing, reversed because of the prosecutor's jury argument among other things. Judge Odom, writing for a majority of the Court, said:

> On rehearing, appellant relies upon his last ground of error which was not considered in the original opinion because of noncompliance with Article 40.90, Sec. 9, Vernon's Ann. C.C.P. He now strenuously argues this ground of error and urges that his case should be reversed for prosecutorical misconduct just as Stein v. State, Tex. Cr. App., 492 S.W.2d 548, was reversed for prosecutorial misconduct of the same prosecutor. We agree.
>
> Without going into the repeated improper questions and arguments of the prosecutor during the trial, suffice it to say that the record is replete with such remarks as: "hippy"; "anti-Christ"; "Swastika"; and, "Communist". It is noted that the court correctly sustained at least twenty-six objections to such remarks. Motions for mistrial were overruled.
>
> The prosecutor's venture outside the record is even more alarming in the instant case than in Stein v. State, supra. And, this is another of those ". . . numerous cases where improper arguments and sidebar remarks by the prosecutor have forced us to reassert the critical importance of convicting an accused only upon that evidence presented, without attempting to inflame or prejudice the minds of the jurors." 492 S.W.2d at page 551.

> The motion for rehearing is granted, the judgment of affirmance is set aside and the judgment is reversed and the cause remanded.

If the majority of the voting members of the Court of Criminal Appeals deem a ground of error untimely raised or raised for the first time in a Motion for Rehearing or in the Application for Leave to File Motion for Rehearing (there is no former, only the latter regarding motions for rehearing, at the present time in Texas), the Court will simply not write on the ground by so stating, will ignore the ground by not so stating, or will decline the Appellant leave to file his motion for rehearing. Usually, however, the opinion reads as follows:

> Appellant's remaining grounds of error were brought forth in a supplementary brief which was not filed in the trial court. We have carefully examined same and have found nothing therein which merits review in the interest of justice, under Article 40.09, Section 13, V.A.C.C.P. Nilsson v. State, 1972, 477 S.W.2d 592 (600).

Of course, the Court of Criminal Appeals recognizes as binding upon it only "the decisions of the United States Supreme Court, the only court whose decisions are binding on this court." See *Delorme v. State*, 1973, 488 S.W.2d 808 (813). Even a majority opinion of the Supreme Court of Texas is not controlling on the court in the opinion of some members of the Court. See Judge Morrison's dissenting opinion in *Seiffert v. State*, 1973, 501 S.W.2d 124, (130). "I cannot bring myself to agree that this Court should consider as authoritative the opinion of the Supreme Court of this State in *Goldstein v. Union National Bank*, 109 Tex. 555, 213 S.W.

584 (1919)." Thus, if this Honorable Court has not seen fit, at this time, specifically and directly to write on the issues presented in the cause at Bar, the Court of Criminal Appeals may have felt that as this Honorable Court has not spoken, there was no need for it to speak in response to Appellant's Application for and Motion for Rehearing. Cf. Ex parte Ates. 487 S.W.2d 353 (Tex. 1972).

It is also interesting to note that the State of Texas, through her Counsel, for authority, as to the contentions raised herein, has cited authority from without the State, excluding the citations from this Honorable Court, when the highest Criminal Court in the State of Texas has recently reaffirmed that it is not bound by "inferior United States Court[s]." See *Turner v. State,* 1973, 497 S.W.2d 593 (594).

Thus, in reply and conclusion, it should be sufficiently clear that under State procedure, Petitioner did present the question of notice to the Court of Criminal Appeals in a proper and timely manner.

II.

Petitioner would further show that since the filing of his Petition for Writ of Certiorari, the Court of Criminal Appeals has now held that *Gagnon v. Scarpelli,* 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), as interpreted by that Court, does not entitle a probationer in Texas to a preliminary hearing to determine probable cause prior to the final hearing on the motion to revoke probation. A certified copy of the decision of *Grant v. State,* No. 48, 129A, February 13, 1974, opinion by Judge

W. A. Morrison, is attached to this reply brief as Exhibit A."

III.

Respondent says that "The state's original motion and first amended motion to revoke probation further specified that the embezzlement resulted from Petitioner's taking $45.00 belong to John Carter." This is true as to motions filed, but it should be pointed out that *this is not the Motion to Revoke Probation on which the State chose to go to trial on.* That Motion merely alleged: "THAT said defendant committed the offense of MISDEMEANOR EMBEZZLEMENT on or about August 31, 1968." (p. 52 of Petitioner's Application). Petitioner was thus subject to every embezzlement case which occurred in Harris County, Texas, between June 14, 1968, and August 31, 1968; a county of almost two million citizens, and the State was not restricted to any embezzlement which may have occurred involving John Carter.

Further, in reply to the Respondent's contention that neither double jeopardy nor its off-shoot, collateral estoppel, are applicable to this case, it is unknown by this record for what reason the trial judge continued the probationer on probation. There is absolutely nothing in the Record on Appeal to show that "the trial court exercised its discretion so as to continue the probation *should the charges against the Petitioner subsequently either be dismissed or the Petitioner be acquitted of them.*" (Emphasis added).

IV.

Petitioner concedes the possible question of the retroactivity of Morrissey and Gagnon is present here as this

Honorable Court has not deemed it appropriate to so state one way or the other. Petitioner is also aware there are a number of Courts, both State and Federal, which have held that these two decisions are not retroactive. See and compare, in addition to the three cases cited by Respondent, the following:

> See Horstmen v. State, 210 N.W.2d 427, Iowa, 1973. Other courts have reached the same conclusion: Parker v. Cardwell, 289 N.E.2d 382 (Ohio App., 1973); Rogers v. Hurley, 486 S.W.2d 696 (Ky. App., 1972); Griffin v. California Adult Authority, 464 F. d 602 (9th Cir., 1972); People Ex. Rel. Marino v. Carscles, 346 N.Y.S.2d 634, N.Y. App., 1973.

However, can it be argued that the benefits flowing from the two decisions were not meant to encompass those cases pending on appeal at the time they were rendered? Morrissey, supra, was decided on June 29, 1972, and Gognon, supra, was decided on May 14, 1973. Petitioner's probation was revoked on February 18, 1972. Even Respondent concedes that "Petitioner was entitled to notice of the revocation hearing." (p. 8 of Brief). Does not notice through the pleadings of what the State alleges against a probationer relate to "the very integrity of the fact-finding process?" Is the right to adequate and sufficient notice not at least on a par with the right to counsel? Petitioner says it is. Cf. *McConnell v. Rhay*,, and *Stiltner v. Rhay*, 393 U.S. 2, 21 L.Ed.2d 2, 89 S.Ct. 32.

As to the claim of non-retroactivity made by the Respondent, Petitioner would show that when Circuit Courts of these United States are holding retroactive such issues

as a hearing on placement in punitive segregation where a person is already in prison and subject to prison life, can it be argued that the claim of notice does not apply to probationers whose cases were pending on appeal at the time of this Court's decisions in *Morrissey*, supra, and *Gagnon*, supra? See and compare the elequent and well written decision of Chief Judge Swygert of the Seventh Circuit in *Adams v. Carlson*, 1973, 488 F.2d 619, commencing at page 625, on the issue of retroactivity. Petitioner's counsel can say no more than what Judge Swygert has already said and refer the Court to that decision which he now does.

In all candor to this Honorable Court, Petitioner had been convicted and a conviction was on appeal for a misdemeanor embezzlement charge, when the first hearing was held. See the Court of Criminal Appeals' original opinion in this Cause, and see also *Bass v. State*, 1971, 464 S.W.2d 668. Also, again, there is nothing to show why the trial court continued the Petitioner on probation. He just did, and the very same evidence adduced at that hearing was used at the second hearing to revoke Petitioner's probation. The additional instruments mean little, if anything, to the contentions raised herein.

Respondent concludes his "Brief in Opposition" with the statement:

> "Respondent submits that it would be unfortunate to punish the action of the trial court which attempted to protect the Petitioner by refusing to revoke his probation until the court had evidence that the offense for which the probation was revoked was a final conviction."

Petitioner would show that the trial court could have held his ruling in abeyance if that were a problem; or could have done a number of things. But, that is the point. That was not done. What could have been done and what was done should be the only concern of this Honorable Court.

Petitioner, in conclusion, says that it would also be unfortunate, in hypothetical fashion, if some probationer paid a $25.00 fine for driving an automobile without a valid Texas driver's license only a couple of days after he received his probation; then, a hearing was held to revoke, but the trial court saw fit not to revoke a ten (10) year probation; and then, almost ten (10) years later, the probationer was summoned back before the Court and the trial judge felt he had erred at the earlier hearing and then revoked for the prior indiscretion on the part of the probationer even though nothing else was shown to be a violation of his probation. This, too, would be most unfortunate and that is why this case can be the vehicle to see that such cases in the field of probation and/or parole law remain hypothetically rather than become a reality. Cf. *Oaks v. Wainwright,* Florida Supreme Court, December 20, 1973, 14 Cr. L. Rep. 2344, where that Court held "A parolee who pleaded *nolo contendere* to a drunkenness charge did not thereby surrender his right to the preliminary revocation hearing required by *Morrissey v. Brewer,* 408 U.S. 471, 11 Cr. L. 3324."

CONCLUSION

For all the reasons stated herein, Certiorari should be granted in this Cause. The ruling and Judgment of the Court of Criminal Appeals of the State of Texas, made and entered on November 21, 1973, should be reversed

and this Cause should be remanded to the said Court of Criminal Appeals of Texas to enter an Order reversing its former Judgment and remanding this Cause for new hearing to the 178th Judicial District Court of Harris County, Texas.

Respectfully submitted,

MARVIN O. TEAGUE
Counsel for Petitioner

999 State National Building
412 Main Street
Houston, Texas 77002
222-1728

CERTIFICATE OF PROOF OF SERVICE

I, Marvin O. Teague, Attorney for Petitioner, Chester Bass, hereby certify that a copy of the foregoing Petitioner's Reply Brief to Respondent's Brief and Opposition has been deposited in the United States Mail, postage prepaid, certified, and properly addressed to Respondent's Counsel, Honorable John L. Hill, Attorney General of the State of Texas, State Supreme Court Building, Austin, Texas, to the attention of Lonny Zwiener, Assistant Attorney General, this the _____ day of March, A.D. 1974.

Marvin O. Teague

APPENDIX

NO. 48,129-A

DONALD RAY GRANT, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Harris County

OPINION

The offense is felony theft; the punishment, five (5) years.

This is an appeal from an order revoking probation.

Appellant's brief filed in the trial court concluded that this appeal was frivolous and complied with the terms of Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and Gainous v. State, Tex. Cr. App., 436 S.W.2d 137 (1969).

Thereafter, appellant's court appointed counsel on appeal sent this Court, without presenting same to the trial court, a supplemental brief in which he seeks to invoke the holding of the Supreme Court of the United States in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), and asks for a reversal because as he contends appellant was not afforded a preliminary hearing held to determine probable cause prior to the final hearing on the motion to revoke probation.

The affidavit attached to the supplemental brief is not properly before this Court. Booth v. State, 499 S.W.2d 129. We decline to discuss appellant's contention as he

requests under Art. 40.09, Sec. 13, V.A.C.C.P., other than to observe that his contention has been answered adversely to him in our recent opinion in Ex parte Shivers, 501 S.W.2d 898.

The judgment is affirmed.

MORRISON, Judge

(Delivered February 13, 1974)

(Seal)

A True Copy
Attest:
Glenn Haynes, Clerk
Court of Criminal Appeals of Texas

By: Tommy Lowe
Deputy